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**From:** Smith, John [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F8CA6BA195244BC38B6E649F46632DFF-SMITH, JOHN]  
**Sent:** 8/22/2018 3:06:38 PM  
**To:** William Bider [KDHE] [William.Bider@ks.gov]; Martin, Mike [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ef9a2087ab3d4ae59efa5d2416de7190-MARTIN, MICHAEL]  
**CC:** Christine Mennicke [KDHE] [Christine.Mennicke@ks.gov]; Leo Henning [KDHE] [Leo.Henning@ks.gov]  
**Subject:** RE: CCR Regulations

Hi Bill – At this point we're reading newsletter accounts, too. General Counsel is supposed to report out on this next Monday. R7 attorney's started looking at it yesterday. This is the Greenwire story on the decision. The part I highlighted below would be a good question for Steven Cook, that is EPA doing anything to modify the CCR rules to make the WIIN Act workable for the state programs. I myself don't know the answer to that.

## COAL ASH

### Court sides with greens, finds Obama-era rule weak

Amanda Reilly, E&E News reporter

Published: Tuesday, August 21, 2018

A federal appeals court issued a complicated ruling in a case over the EPA coal ash rule. AllNikArt/Pixabay

*This story was updated at 3:57 p.m. EDT.*

A federal court today agreed with environmentalists that some parts of Obama-era regulations governing coal ash disposal weren't stringent enough. The ruling came as the new administration seeks changes to the landmark standards.

The U.S. Court of Appeals for the District of Columbia Circuit threw out provisions in the Obama rules that allowed unlined and clay-lined impoundments to receive coal ash, as well as an exemption for inactive impoundments at power plants that are no longer producing energy.

Those provisions failed to lower the "significant risk" associated with the toxic sludge, according to the three-judge panel.

EPA's approach "does not address the identified health and environmental harms documented in the record. ... Moreover, the EPA has not shown that harmful leaks will be promptly detected; that, once detected, they will be promptly stopped; or that contamination, once it occurs, can be remedied," the court opinion says.

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The court denied all of industry's claims that EPA went too far with the 2015 rule.

Judges Patricia Millett and Cornelia Pillard, both Obama appointees, issued the per curiam opinion with Judge Karen LeCraft Henderson, a George H.W. Bush appointee. Henderson also issued a concurring opinion.

The Obama EPA published the regulations in April 2015 after years of work. They covered the storage and disposal of the large amounts of coal ash produced by coal-fired power plants, setting standards for lining, structural integrity, groundwater monitoring and recycling.

Coal ash, which is typically stored in piles or pools at coal-fired power plants, is one of the nation's largest waste streams. In 2012, coal-fired power plants produced about 110 million tons of the waste, according to EPA data.

At the time of the regulations, EPA identified 157 cases where coal ash mismanagement had caused damage to human health and the environment, including the 2008 spill at a Tennessee Valley Authority plant that forced the closure of the Emory River for two years.

Following the rule's release, environmentalists and industry took up familiar battle stations. Greens argued the rule wasn't stringent enough, while industry said EPA had exceeded its authority under the Resource Conservation and Recovery Act.

Shortly before oral arguments in the D.C. Circuit, the Trump administration threw a curveball into the litigation with an announcement that it intended to reconsider the rule.

The administration asked the court to place the litigation in abeyance, arguing that it needed time to consider the effects of a law Congress passed in late 2016 authorizing states to set up permitting programs to enforce the rules. Separately, EPA filed a motion to remand key provisions (*E&E News PM*, Nov. 20, 2017).

The D.C. Circuit went ahead with arguments, holding a marathon 2 ½-hour session in November in which judges expressed skepticism over the Trump administration's plans (*Greenwire*, Nov. 21, 2017).

## Unlined pits

In today's ruling, the judges formally denied the administration's bid to pause the case while it rethinks the regulations.

They did, however, partially grant EPA's request to remove some issues from the litigation, including the rule's threshold for coal ash that is recycled instead of disposed.

The bulk of the 63-page opinion, though, centers on environmentalists' claims.

Greens had argued the rule allows unlined pits to receive coal ash indefinitely until leaks are detected, even though EPA has found that such unlined pits are particularly dangerous.

The D.C. Circuit panel agreed with greens that the rule is "inadequate" under the hazardous waste law. Judges cited EPA's regulatory impact analysis, which found that the hundreds of unlined impoundments in the country have a 36.2 percent to 57 percent chance of leaking in the foreseeable future.

"Those hundreds of unlined impoundments are at significant risk of harmful leakage," the court opinion says. "Impoundment leakages pose substantial risks to humans and the environment."

The court slammed EPA for also failing to consider the harms that may occur while leaking sites are being closed or retrofitted — a process that can last years.

The D.C. Circuit likewise found the rule's provision for "clay-lined" coal ash impoundments "suffers from the same lack of support."

Clay-lined impoundments refer to pits that have at least 2 feet of compacted soil acting as a buffer between coal ash and soil. The 2015 rule allowed such impoundments to stay open and keep accepting coal ash.

The court said EPA not only ignored the risks of leakage from clay-lined pits but also failed to demonstrate that leaking liners could be repaired or to examine the harms that can occur while an operator puts together a plan to respond to a leak.

## 'Legacy ponds'

The D.C. Circuit also struck down the rule's exemption for "legacy ponds" located at coal-fired power plants that have been shuttered.

EPA's decision not to regulate such ponds "makes no sense" in the face of the "unique confluence of risks" they present, the court said.

"Notably, this very Rule was prompted by a catastrophic legacy pond failure that resulted in a 'massive' spill of 39,000 tons of coal ash and 27 million gallons of wastewater into North Carolina's Dan River," the court opinion says.

"Nevertheless, the EPA chose to leave legacy ponds on the regulatory sidelines," the court said.

The court rejected EPA's arguments that its approach was justified because it's difficult to identify the parties responsible for ponds located at closed power plants. EPA has been compiling data on the locations for legacy ponds for nearly a decade, the opinion says.

"The asserted difficulty in locating the owners or operators responsible for legacy ponds does not hold water," the D.C. Circuit concluded.

While today's opinion closes a phase of the litigation over the coal ash rule, it's not likely to be the last word. On July 30, EPA published a package of changes to the Obama regulations that gives states more flexibility in creating their own permitting programs under the 2016 coal ash law.

Environmental groups have denounced the changes as a giveaway to power producers ([Greenwire](#), July 30).

The July rule is the first of several of the Trump administration's planned steps for rolling back the regulations.

"There's a lot in today's decision that should prevent the Trump administration from moving forward with its rollbacks," said Thomas Cmar, an attorney at Earthjustice who argued the D.C. Circuit case for environmentalists.

But, he added, "we have every reason to think that they won't simply give up and take their ball and go home, that they'll move forward with further efforts to roll back pieces of the rule and we'll have to go back to court again."

[Click here](#) to read the court opinion.

John J. Smith, Deputy Director  
Air & Waste Management Division  
EPA Region 7  
Desk 913-551-7845  
Cell 913-645-4672

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**From:** William Bider [KDHE] [mailto:William.Bider@ks.gov]  
**Sent:** Wednesday, August 22, 2018 9:50 AM  
**To:** Smith, John <Smith.John@epa.gov>; Martin, Mike <Martin.Mike@epa.gov>  
**Cc:** Christine Mennicke [KDHE] <Christine.Mennicke@ks.gov>; Leo Henning [KDHE] <Leo.Henning@ks.gov>  
**Subject:** CCR Regulations

John and Mike,

Have you seen this yet? It could have major implications on our CCR application and our upcoming conversation with Steven Cook and Jim Gulliford. What do you think and do you believe this decision is likely to be appealed to the U.S. Supreme Court?

From my initial reading of this article, it seems that the court wants a more stringent approach to the surface impoundment standards with no flexibility based upon the lack of existing releases or risk-based decisions when releases have occurred. The court appears to be saying that since some unlined surface impoundments have leaked, all may leak, so all have to be constructed according to the higher standard (composite liner system).

Bill Bider  
Director

